California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman and Commissioners Downey, Knox, Scott and Swanson

From: Holly B. Armstrong, Commission Staff Counsel
John W. Wallace, Senior Commission Counsel
Luisa Menchaca, General Counsel

Re: Proposition 34 Regulations: Extensions of Credit and Personal Loans (§ 85307) - Pre-Notice Discussion of Proposed Regulations 18530.7 and 18530.8

Date: August 16, 2001

Introduction and Background

Proposition 208 passed by the voters in November 1996 (effective January 1, 1997), provided that extensions of credit for more than 30 days, other than loans from financial institutions given in the normal course of business, were subject to all contribution limitations. In addition, Proposition 208 provided that a candidate could not make personal loans to his or her campaign or campaign committee that totaled more than $20,000 in any single election.

On January 6, 1998, the United States District Court for the Eastern District of California entered a preliminary injunction barring the enforcement of Proposition 208. With the passage of Proposition 34 in November 2000, most of Proposition 208, including the extensions of credit section was repealed.

With some modifications, Proposition 34 continued Proposition 208's restrictions on personal loans and extensions of credit.

Proposition 208's version of Government Code § 85307[1] provided:

> "(a) A loan shall be considered a contribution from the maker and the guarantor of the loan and shall be subject to all contribution limitations;
>
> "(b) Extensions of credit for a period of more than 30 days, other than loans from financial institutions given in the normal course of all business, are subject to all contribution limitations;

[1] All statutory references are to the Government Code, unless otherwise specified.

> "(c) No candidate shall personally make outstanding loans to his or her campaign or campaign committee that total at any one point in time more than twenty thousand dollars ($20,000) in the case of any candidate, except for candidates for governor, or fifty thousand dollars ($50,000) in the case of candidates for governor. Nothing in this chapter shall prohibit a candidate from making unlimited contributions to his or her own campaign."

The current version of Section 85307, which was enacted by Proposition 34, provides:

> "(a) The provisions of this article regarding loans apply to extensions of credit, but do not apply to loans made to a candidate by a commercial lending institution in the lender's regular course of business on terms available to members of the general public for which the candidate is personally liable.
>
> "(b) A candidate for elective state office may not personally loan to his or her campaign an amount, the outstanding balance of which exceeds one hundred thousand dollars ($100,000). A candidate may not charge interest on any loan he or she made to his or her campaign."

Because the statute covers two distinct and diverse issues, i.e., extensions of credit and personal loans, staff determined that two different regulations would be required to address the separate issues.

An interested persons meeting was held on May 30, 2001, which was attended by a cross-section of political attorneys, representatives of the major political parties, the Franchise Tax Board, and the Secretary of State's Office.

EXTENSIONS OF CREDIT
Proposed Regulation 18530.7

Proposed Regulation 18530.7 is a modification of the previous version of the regulation that was adopted under Proposition 208. Under Proposition 208, extensive meetings were held with members of the regulated community to develop the previous version Regulation 18530.7. Those who participated in drafting Regulation 18530.7 included staff, vendors, political attorneys, treasurers, and campaign consultants. The regulation became operative on December 11, 1997, and was enjoined by the U.S. District Court for the Eastern District of California on January 6, 1998.

Proposition 208's version of Regulation 18530.7 was repealed effective June 3, 2001.

Despite the short time period in which it was effective, at the interested persons meeting regarding Section 85307, the regulated community universally felt that Regulation 18530.7 should be re-enacted in substantially the same form under Proposition 34. The regulation was discussed point-by-point at the interested persons meeting and, without exception, the regulated community ratified each point's inclusion in a new version of Regulation 18530.7. Therefore, with some minor modifications to conform the regulation to the structure of Proposition 34 and the current version of Section 85307, proposed Regulation 18530.7 is substantially the same regulation that was previously adopted by the Commission in 1997. The only decision points presented for the Commission's consideration are various time frames that were mandated by Proposition 208 but are not mandated by Proposition 34. Staff makes no recommendations on these decision points, but provides arguments in support of and against extended time frames.

The Regulation

Subdivision (a) of proposed Regulation 18530.7 defines "extension of credit" for purposes of Article 3. Perhaps it should be noted that the phrase "extensions of credit" appears nowhere else within the Political Reform Act but in Section 85307(a).

> "(a) An 'extension of credit' for purposes of Chapter 5, Article 3 of this Title means the provision of goods or services for which payment in full is not received. An extension of credit is deemed to begin by the earlier of two dates: (1) 15 days after the date specified on the invoice for payment; or (2) 45 days from the date the goods or services were delivered."

Subdivision (b) defines "payment in full," a phrase that appears in subdivision (a).

> "(b) 'Payment in full' means payment of not less than fair market value for the goods or services provided."

Decision 1

Subdivision (c) defines when an extension of credit becomes a contribution subject to the contribution limits of the Act. Under Proposition 208, this period was mandated as being 30 days. However, this period is not mandated under Proposition 34. Therefore, this area presents the first decision point for the Commission to consider. **Decision 1** offers the options of 30 days, 60 days, or 90 days. The regulated community made no request for any extension of this time period beyond the original 30 days allowed under the original regulation.

Subdivision (d) also contains a **Decision 1**. Subdivision (d) prevents a creditor from giving, and a candidate from accepting, more credit when the candidate has an extension of credit that exceeds the contribution limits for a period of time that has caused the extension of credit to become a contribution. When a creditor extends credit to such a candidate, the inference is reasonable that the creditor is attempting to give an in-kind contribution and help the

candidate finance his or her election through the accumulation of additional debt. Subsection (f)(7) also contains a **Decision 1** because it incorporates a reference to subdivision (d).

> "(c) An extension of credit for a period of more than **{Decision 1}**[30/60/90] days is a contribution subject to all of the contribution limitations of Chapter 5, Article 3 of this Title, except as provided in subdivisions (e) and (f) of this regulation.
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> "(d) If a candidate or any committee subject to the contribution limits set forth in Government Code sections 85301, 85302 and 85303 has an extension of credit for more than **{Decision 1}**[30/60/90] days outstanding with a provider or vendor of goods or services, any additional credit extended to the candidate or the committee from the person is subject to all of the contribution limitations of Chapter 5, Article 3 of this Title."
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> ¶ . . .¶
>
> "(f)(7)The provider or vendor of goods or services did not extend any additional credit to the candidate or any committee subject to the contribution limits set forth in Government Code sections 85301, 85302 and 85303 when the candidate or the committee already had an extension of credit for more than **{Decision 1}**[30/60/90] days outstanding with the same provider of goods or services as provided in subdivision (d) of this regulation."

Subdivision (e) specifies the exception set forth in Section 85307(a):

> "(e) Loans made to a candidate by a commercial lending institution in the lender's regular course of business on terms available to members of the general public for which the candidate is personally liable are not subject to Chapter 5, Article 3 of this Title including this regulation."

As requested by the regulated community, subdivision (f) would provide a "safe harbor" for vendors from an enforcement action by the Commission. Compliance with the subdivision would also be evidence of good faith in any civil, criminal or administrative matter. By taking certain precautions, a vendor can prevent himself/herself from becoming subject to a Commission enforcement proceeding, and an "innocent victim" to a candidate who refuses to or cannot pay a debt. On the other hand, the enforcement division would have the tools to

prosecute a person who is attempting to make in-kind contributions above the limits to a candidate or committee.[2]

> "(f) If all of the following criteria are satisfied by a provider or vendor of goods or services, it shall (i) be a complete defense for the provider or vendor of the goods or services in any enforcement action initiated by the Commission, (ii) relieve the provider or vendor of the goods or services of any reporting requirements of this title, and (iii) be evidence of good faith conduct in any subsequent civil, criminal or administrative proceeding:
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> "(1) The credit arrangement was recorded in a written instrument;
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> "(2) It is a primary business of the provider or vendor of goods or services to provide similar goods or services;
>
> "(3) The provider or vendor of goods or services provided the goods or services in the ordinary course of business and on the same terms and conditions offered to customers generally;
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> "(4) The provider or vendor of goods or services did not have actual knowledge that the candidate or committee would not be able to pay within the time limit specified in subdivision (a) of this regulation;
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> "(5) The provider or vendor of goods or services made reasonable efforts to collect the full amount of the payment owed within four months of the date specified in subdivision (a) of this regulation;
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> "(6) The provider or vendor of goods or services entered into the agreement with the intent that the candidate or committee would be required to pay within the time limit specified in subdivision (a) of this regulation; and
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> "(7) The provider or vendor of goods or services did not extend any additional credit to the candidate or any committee subject to the contribution limits set forth in Government Code sections 85301, 85302 and 85303 when the candidate or the committee

[2] In the memo prepared for the March 2001 meeting addressing the repeal of the Proposition 208 regulations, with respect to the repeal of Regulation 18530.7, staff recommended that this subdivision be retained, along with some of the definitions in Regulation 18530.7.

already had an extension of credit for more than **{Decision 1}**[30/60/90] days outstanding with the same provider of goods or services as provided in subdivision (d) of this regulation."

Decision 1 in subsection (f)(7) has already been addressed above.

Subdivision (g) sets the parameters of the applicability of the regulation.

"(g) This regulation and subdivision (a) of Government Code section 85307 shall apply only to extensions of credit between a provider or vendor of goods or services and a candidate or any committee subject to the contribution limits set forth in Government Code sections 85301, 85302 and 85303."

PERSONAL LOANS
Proposed Regulation 18530.8

This regulation addresses subdivision (b) of Section 85307, dealing with the $100,000 limit on a candidate's personal loans to his or her controlled committee.

Decision 1

Subdivision (a) addresses the situation in which a candidate may have personal loans from previous elections that pre-date the effective date of Proposition 34.

"(a) Any personal loan made before January 1, 2001 by a candidate for elective state office **{Decision 1, option a/option b}**[does not/does] count toward the $100,000 loan limit of subdivision (b) of Government Code section 85307."

This is, essentially, a question of whether or not to apply Section 85307(b) retroactively.

An impermissible "retroactive" application "applies the new law of today to the conduct of yesterday." *Rosasco v. Commission on Judicial Performance*, 82 Cal. App. 4th 315, 322 (2000). A statute is not "retroactive" merely because some of the facts upon which its application depends came into existence before its enactment. *Kizer v. Hanna*, 48 Cal. 3d 1, 7 (1989). In other words, a statute operates retroactively when it changes the legal consequences of an act *completed* before the effective date of the statute. *Florence Western Medical Clinic v. Bonta*, 77 Cal. App. 4th 493, 502 (2000). The courts in California generally disfavor giving retroactive effect to a new law. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1207 (1988). Thus, absent clear legislative intent to the contrary, courts generally presume that a new statute is not meant to have retroactive effect. *Id.*

Because Section 85307(b) was adopted as part of a ballot measure, we look to the ballot pamphlet for insight into the intent of the voters with respect to retroactivity. The ballot pamphlet in this instance makes no reference to retroactive application, which supports, an argument against retroactive application of the statute **(option a).**

However, in support of **option b**, the retroactive application of the statute, is the following language from Section 85307:

> "(b) A candidate for elective state office may not personally loan to his or her campaign an amount, *the outstanding balance of which* exceeds one hundred thousand dollars ($100,000)." (emphasis added.)

If the highlighted phrase, "*the outstanding balance*" is to be given effect, it would seem that any pre-January 1, 2001 balance from prior loans would have to be carried over into 2001. Otherwise, the "outstanding balance" language would be meaningless in the context of loans made on January 1, 2001. On the other hand, the language could be referring to the aggregation of outstanding loans made after January 1, 2001, since presumably multiple loans could be made to a candidate's campaign bank account even after January 1, 2001.

Staff Recommendation: Staff recommends **option a**. It is staff's opinion that there is insufficient authority for retroactive application of the statute.[3] **Option a** would also be consistent with the Commission's decisions regarding the application of Section 85316.

Decision 2

Subdivision (b), and **Decision 2**, comprise the biggest policy decision presented for the Commission's consideration in this regulation. In **Decision 2, options a and b,** the Commission is asked to decide whether the $100,000 personal loan limit imposed by Section 85307 is applicable on a "per election" basis, with a candidate receiving a new $100,000 limit for each election, or whether all of a candidate's loans to all of his or her controlled committees should be aggregated. This presents a problem of statutory construction. A brief review of governing principles of statutory construction may be useful at the outset.

"In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." *Estate of Griswold,* No. S087881, 2001 WL 694081, at *3 (Cal. Sup. Ct., June 21, 2001). However,

[3] Pending Commission action on this issue, the *Valencia* Advice Letter, No. A-00-273, was issued on April 11, 2001, in which staff advised Assemblymember Anthony Pescetti that the prohibition of Section 85307(b) did not apply to any personal loan made by a candidate before January 1, 2001. Therefore, if the Commission chooses to select **option b**, the *Valencia* Advice Letter should be rescinded.

> "The motive or purpose of the drafters of a statute is not relevant to its construction absent reason to conclude that the body which adopted the statute was aware of that purpose and believed the language of the proposal would accomplish it. [Citations omitted.] The opinion of drafters or of legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent." [Citations omitted.]

Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission, 51 Cal. 3d 744, 764, fn. 10 (1990). The proper approach to construction of a statute is succinctly outlined as follows:

> "We begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citations omitted.] If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.] If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation omitted.] In such cases, we select the construction that comports most closely with the apparent intent of the Legislature, with a view of promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citations and internal quotation marks omitted.]

Estate of Griswold, supra.

In construing the meaning of Section 85307(b), it is first necessary to examine the statutory language, giving the words their usual and ordinary sense, to determine whether the statute has a clear, unambiguous meaning. If the statute has an unambiguous meaning, then "plain meaning" is applied and the interpretational task requires nothing further.

If, on the other hand, the statute is "ambiguous" (that is, capable of more than one reasonable interpretation)[4], it is necessary to turn for assistance in interpretation to "extrinsic sources including the ostensible objects to be achieved and the legislative history." (*Estate of Griswold, supra*, 2001 WL 694081, at *3.)

The remainder of this memorandum relating to Decision 2 is presented on the assumption that Section 85307(b) is ambiguous, and that we must resort to extrinsic evidence of its meaning.

[4] "When the language of a statute is 'clear and unambiguous,' and thus not reasonably susceptible of more than one meaning, there is no need for construction and courts should not indulge in it." *People v. Camarillo*, 84 Cal.App. 4th, 1386, 1391 (2000).

On this point, although Proposition 34 was a legislative initiative, the Legislature's intent in drafting Section 85307(b) is irrelevant since there is no indication that the voters had any idea of the drafters' intent. (*Taxpayers, supra*, 51 Cal.3d at 764, n. 10). When seeking to ascertain the voters' intent, the normal procedure is to review the voter information pamphlet that is distributed to all registered voters in the state. The Official Voter Information Guide for the November 2000 election (containing the official summary of Proposition 34, as well as the ballot arguments for and against the measure), at the Analysis by the Legislative Analyst section states the following:

> "Under this measure, candidates would be allowed to give unlimited amounts of their own money to their campaigns. However, the amount candidates could loan to their campaigns would be limited to $100,000 and the earning of interest on any such loan would be prohibited."

(Official Voter Information Guide, November 2000 Election, pg. 14.)

Perhaps more helpful to the present analysis, however, is the following statement regarding the subject matter of Section 85307(b), which is found in the Arguments in Favor of Proposition 34, in the Official Voter Information Guide:

> "PROPOSITION 34 CLOSES LOOPHOLES FOR WEALTHY CANDIDATES
>
> Wealthy candidates can loan their campaigns more than $100,000 then have special interests repay their loans. Proposition 34 closes this loophole."

Decision 2, option a, would require the candidate to aggregate all of his or her personal loans made to all of his or her controlled committees.

> "**{Decision 2, Option a}**(b) The $100,000 personal loan balance specified by subdivision (b) of Government Code section 85307 as a candidate's personal loan limit applies to the aggregate amount of all personal loans made by the candidate to all of his or her controlled committees formed for the purpose of seeking elective state office combined **{Option (a)(1)}**[with any personal funds loaned to any of a candidate's controlled committees formed for the purpose of seeking local elective office but later transferred to any of the candidate's controlled committees formed for the purpose of seeking elective state office], excluding committees formed for the purpose of collecting Legal Defense Funds pursuant to Government Code section 85304."

Option (a)(1) would include within the aggregated balance any loans made to committees formed for the purpose of seeking local elective office, but which were later transferred to the candidate's controlled committee formed for the purpose of seeking elective state office, thereby conforming this regulation with the Commission's decision in *In re Pelham*, 15 FPPC Op. 1 (May 7, 2001).

Loans made to local committees and used exclusively for the purpose of seeking elective local office would be excluded when calculating the $100,000 loan balance permitted by Section 85307(b), as that section is only applicable to "[a] candidate for elective ***state*** office." (emphasis added) Loans made to Legal Defense Fund committees formed pursuant to Section 85304 would also be excluded from the aggregated balance.

This option would appear to be supported by the Arguments in Favor of Proposition 34, from the Official Voter Information Guide, quoted above. According to the Argument quoted above, one of the goals of Proposition 34 was to discourage the wealthy candidate from being able to loan himself or herself more than $100,000, and then obtain contributions to pay off the loans. This was partially accomplished by the imposition of contribution limits.

However, the other half of the equation is the wealthy candidate who can lend himself or herself more than $100,000, unless aggregation of personal loans to all of the candidate's controlled committees is required. Absent such aggregation, the wealthy candidate will simply be able to loan himself or herself a "new" $100,000 with each election. This may be contrary to the intent of the initiative as described in the Voter Information Guide.

Decision 2, option b, provides the "per election" option, by which a candidate would be permitted a new $100,000 loan balance for each election in which he or she participated.

> "**{Decision 2, Option b}**(b) The $100,000 personal loan balance specified by subdivision (b) of Government Code section 85307 as a candidate's personal loan limit applies to a candidate's campaign on a "per election" basis, which is renewed with each new election."

This option is supported by the overall "per election" approach the Commission has taken in implementing Proposition 34. Further, it may be argued that the "loophole" referred to in the ballot pamphlet argument, by which wealthy candidates loan themselves funds in excess of $100,000 and then have special interests pay off the loans, has been sufficiently closed by the imposition of contribution limits. Therefore, allowing a candidate to loan himself or herself $100,000 in each election cycle does not have the potential for corruption that it once had.

Staff Recommendation: Staff makes no recommendation on this proposed regulation, except to the extent that if the Commission selects **Option a**, staff recommends that **option (a)(1)** also be adopted.

The purpose of subdivision (c) is to clarify that the balance of the personal loans may not, at any one time, exceed $100,000, but that additional loans may be made at any time when the loan balance is below the $100,000 limit.